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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH SISKIYOU WILDLANDS)	
CENTER, et al.,)	
)	
Petitioner,)	No. CV 05-3094-CL
)	
v.)	
)	OPINION AND ORDER
BUREAU OF LAND MANAGEMENT,)	
)	
Respondent.)	
)	

PANNER, J.

On November 27, 2007, Magistrate Judge Clarke filed his Report and Recommendation (R&R), which recommends granting Plaintiffs' petition for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Both sides have timely filed objections. Plaintiffs have filed supplemental timesheets, covering hours incurred in litigating this fee petition. Including the supplemental timesheets, Plaintiffs are seeking an award of \$57,173.00 in attorney fees, and \$309.62 in costs. The matter is now before me for de novo review pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

Discussion

I previously ruled the court has subject matter jurisdiction over the fee petition, and that Plaintiffs are "prevailing

parties." It is undisputed that Plaintiffs meet the basic statutory requirements (such as net worth or charitable status) to be eligible to apply for fees under EAJA, see 28 U.S.C. § 2412(d)(2)(B) (defining "party"), and that the application is timely. § 2412(d)(1)(B). A few issues remain.

Substantial Justification: The R&R concludes the position of the United States was not "substantially justified" for purposes of § 2412(d)(1)(A). The Magistrate Judge's discussion of this issue is well-reasoned. Defendant's objection is overruled. Plaintiffs are entitled to recover reasonable attorney fees and costs.

Hourly Rate: Defendant argues the hourly rate should be limited to \$125 an hour, plus a cost of living adjustment. Magistrate Judge Clarke stated sufficient reasons for allowing a higher rate in this instance. I will make one modification, and compensate Ms. Dugan at \$225 (rather than \$250) per hour. I decline Defendant's invitation to reduce Ms. Madden's rate commensurately. The number of years an attorney has practiced is merely one consideration in determining a fair hourly rate for an attorney in a particular case and market.

Partial Success: Plaintiffs prevailed only on some claims. Consequently, the R&R concludes, they achieved only partial success. The R&R recommends halving the fee award for hours incurred before November 6, 2006, while awarding full compensation for hours incurred from that date forward.

Plaintiffs are correct that the court did not rule against them on any claim. Instead, the claims on which Plaintiffs

failed to prevail were dismissed as moot, once the government agreed to provide much of the relief Plaintiffs had sought in this action.

Plaintiffs had alleged a variety of legal theories and defects. In addition to red tree voles and Annual Species Review process--on which Plaintiffs prevailed--they contested the range of project alternatives considered, and matters regarding Elk Management Areas. That Plaintiffs prevailed on one legal theory, alleging one particular defect, doesn't mean Plaintiffs necessarily would have prevailed on their other claims and theories. Considerable time was devoted to issues common to all claims, but considerable effort also was devoted to arguments never adjudicated.

Under the circumstances, the Magistrate Judge was not compelled to reduce the fee award on the basis of "partial success," but neither was such an adjustment prohibited. The trial court has considerable leeway to decide what compensation is reasonable for the services performed. I also have taken into consideration the total amount of fees awarded, and whether it is reasonable given the services performed and results achieved. Plaintiffs' objection is overruled.

Motion to Dismiss and Related F&R: The R&R states, "The court will award plaintiff all their fees after November 6, 2006, as they relate to objections to the Findings and Recommendation, the motion to dismiss, and the motion for costs and fees." Defendant objects to the award of fees in connection with the first two enumerated items. Defendant objects not only to the

time that counsel devoted to briefing those matters, but even to compensating Plaintiffs' counsel for the time spent reading my 17-page opinion.

The Findings & Recommendation, dated November 7, 2006 ("2006 F&R"), recommended granting summary judgment for Plaintiff on portions of three claims, and dismissing the remaining claims as moot. Defendant objected to the 2006 F&R, asserting the entire matter should be dismissed as moot because the government--faced with imminent defeat--had now agreed to provide nearly all of the relief sought by Plaintiffs. Contemporaneous with the objections, Defendant filed a motion to dismiss. Plaintiffs opposed dismissal. Plaintiffs urged the court to enter judgment for Plaintiffs on the claims the government had now conceded, and adjudicate the remaining claims.

I overruled the 2006 F&R, and granted the government's motion to dismiss. With the benefit of hindsight, adopting the Magistrate Judge's 2006 F&R might have been the wiser path, avoiding the dispute over subject matter jurisdiction that followed. In any event, Magistrate Judge Clarke has now concluded that Plaintiffs are entitled to recover the fees they incurred in connection with the 2006 F&R and motion to dismiss, including time spent briefing the matter and reading this court's decision. I adopt that recommendation.

Computational Errors: As sometimes happens with fee petitions, the R&R contains a few computational errors. The sums stated on pages 16-18 actually total \$26,235, not \$20,355 as stated in the conclusion section. 3.2 hours requested by Madden

were mistakenly included in the \$190/hour column, instead of the \$175/hour column. The R&R states it is awarding Plaintiffs fees incurred in connection with the 2006 F&R and motion to dismiss, but inadvertently omitted those sums from the final computation.

Supplemental Fee Request: The R&R properly concludes that Plaintiffs are entitled to recover reasonable fees incurred in litigating this fee petition. Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154 (1990). Some hours were incurred after the original fee petition was submitted, and are not addressed in the R&R. Plaintiffs have submitted, and I have considered, timesheets documenting those additional hours. The government has litigated the fee issue every inch of the way, forcing Plaintiffs to expend considerable time in response. I am deducting three hours from the award, as some of Plaintiffs' objections to the current R&R were unavailing. The reduction is not greater only because some objections were well taken, and additional time was spent responding to Defendant's objections.

Miscellaneous Objections: Defendant objects to compensating Plaintiffs' counsel for 0.25 hours (15 minutes) for participating in a telephone conference with the court. Defendant argues it was not necessary for both of Plaintiffs' attorneys to participate. I do not condone overstaffing, but it was an important conference and a comparatively small sum of time.¹

¹ Everybody's time is wasted if the court sets a hearing or trial date, only to belatedly learn an absent co-counsel has a scheduling conflict. Sometimes it is more efficient for both attorneys to participate in a telephone conference, while other times it is unnecessary. Attorneys must use their good judgment.

Defendant argues Judge Clarke should have disallowed certain hours in their entirety, because of alleged "block billing." That objection is overruled. Block billing occurred only in a few instances, and did not interfere with the court's ability to fully discharge its review function. Disallowing those hours, in this instance, would be an unwarranted windfall for Defendant.

Defendant objects to .02 hours (1 minute) that Plaintiffs' counsel billed for responding to a telephone call from Magistrate Judge Cooney's courtroom deputy. Answering a call from the court's staff is a necessary expenditure.

Costs: Defendant does not contest the award of costs.

Summary of Fees and Costs Awarded


Attorney	Hours	Rate	Amount	Description
Madden	35.2	\$175	\$ 6,160.00	Through 12/27/05 (after 50% reduction of hours for partial success)
Madden	41.85	\$190	\$ 7,951.50	From 12/29/05 through 11/05/06 (after 50% reduction for partial success)
Madden	63.0	\$190	\$11,970.00	From 11/6/06 through 12/31/06
Madden	53.2	\$205	\$10,906.00	Hours incurred during 2007 (less adjustment regarding certain objections)
subtotal			\$36,987.50	Madden
Dugan	2.25	\$225	\$ 506.25	Prior to 11/6/06 (after 50% reduction)
Dugan	17.02	\$225	\$ 3,829.50	From 11/6/06 to present
subtotal			\$ 4,335.75	Dugan
Total Fees			\$41,323.25	Total fees awarded
Costs			\$ 309.62	Total costs awarded

Conclusion

The Report and Recommendation (docket # 98) are adopted, with the adjustments made above. Plaintiffs' motion (# 77) for an award of attorney fees and costs is granted. Plaintiff is awarded \$ 41,323.25 in attorney fees and \$309.62 in costs.

IT IS SO ORDERED.

DATED this 7 day of February, 2008.


OWEN M. PANNER
U.S. DISTRICT JUDGE